tire track must be sold, and from the proceeds the outstanding purchase money first paid; and, second, that 252/588 of the entire sale price, without any deduction, be paid to the plaintiff, and the residue of such proceeds of sale be divided equally between the plaintiff and the defendant.

We are of opinion that all of the decrees entered herein are erroneous, that each of them must be set aside and annulled, and the cause remanded to the circuit court for further proceedings in accordance with the views expressed in this opinion.

Reversed.

R. S. OGLESBY CO. *et al. v.* BANK OF NEW YORK.

March 13, 1913.

[77 S. E. 468.]

1. Bills and Notes (§ 2*)—Attorney's Fee Clause—Law Governing.—The clause of a note, stipulating for a fee of 10 per cent. in case of collection by an attorney, is, like those for payment of interest and exchange, a mere incident to the principal contract, to be governed by the same law, and so cannot be considered a Virginia contract; the note, though made in Virginia, being a New York contract.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 30; Dec. Dig. § 2.*]

2. Bills and Notes (§ 110*)—Attorney's Fee Clause—Validity.—A clause in a note, providing for a 10 per cent. fee in case of collection by an attorney, is authorized by Negotiable Instrument Law N. Y. (Consol. Laws 1909, c. 38) § 21, and is valid in New York.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 221; Dec. Dig. § 110.*]

3. Bills and Notes (§ 110*)—Provisions as to Attorney Fee.—The clause of a New York note, providing for a 10 per cent. fee in case of collection by attorney, is not contrary to the public policy of Virginia, as regards the question whether its courts will enforce it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 221; Dec. Dig. § 110.*]

4. Contracts (§ 101*)—Validity—What Law Governs—Comity.—A contract valid at place of performance, another state, will be enforced in Virginia, though a similar contract made and to be performed in Virginia would not be upheld.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 455-460; Dec. Dig § 101.]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Error to Corporation Court of Lynchburg.

Action by the Bank of New York against R. S. Oglesby Company and another. Judgment for plaintiff; defendants bring error. Affirmed.

Harrison & Long, of Lynchburg, for plaintiff in error.
Kirkpatrick & Howard, of Lynchburg, for defendant in error.

WHITTLE, J. On motion by the defendant in error against the plaintiffs in error on two negotiable notes made by them at Lynchburg, Va., payable to themselves or order at the Bank of New York, and indorsed to the bank for a New York loan, the court included in its judgment the stipulated fee of 10 per cent. for collection by attorney. In that particular the correctness of the judgment is drawn in question by this writ of error.

[1] It is admitted that the notes are New York contracts; but it is contended that the case must be controlled by the law of this state, and that by that law the stipulation to pay an attorney's fee is regarded as a penalty, and not enforceable. Again, it is sought to segregate that clause from the main contract, and to withdraw it from the influence of the law of New York, on the theory that, though the principal sum is payable in New York, the attorney's fee is not, and the note having been made in Virginia makes that stipulation a Virginia contract. No authority is cited on the point, and it would seem plain that the provision, like those for the payment of interest and exchange, is a mere incident to the principal contract, and to be governed by the same law.

[2] The case involves the two propositions: Whether or not the attorney's fee clause in a negotiable note is valid in New York, and, if so, whether the Virginia courts will enforce it.

The plaintiff proved that both by the statute and common law of New York the stipulation is valid. Extracts from the Negotiable Instrument of Law of New York (Consol. Laws 1909, c. 38) were introduced, from which it appears that, upon the question at issue, it is substantially the same as the Virginia act. The provision is as follows:

"Article 3, section 21. Certainty as to sum; what constitutes. The sum payable is a sum certain within the meaning of this chapter although it is to be paid: 1. With interest; or 2. By stated installments; or 3. By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; or 4. With exchange, whether at a fixed rate or at the current rate; or 5. With costs of collection or an attorney's fee in case payment shall not be made at maturity."

It was also proved by attorneys of high standing in New York that the 10 per cent. attorney's fee clause was legal and binding upon the maker of a negotiable note, both by statute and the unwritten commercial law of the state. Indeed, it is shown that the Negotiable Instrument Law has, in effect, carried into statute the previously existing law.

It is objected, however, that the tendency of the testimony of these witnesses is rather to construe the statute than to prove what the law of New York is.

In reply to a similar suggestion, in Dickinson *v.* Hoomes, 8 Grat. (49 Va.) 353, Moncure, J., says, at page 409; "But I incline to think that the doctrine of primary and secondary evidence does not apply to the case, and that a foreign law, whether written or unwritten, may be proved by a person who is learned in that law, without laying any foundation for the introduction of secondary evidence. This is the principle of a late decision of the court of Queen's Bench. * * * 55 Eng. C. L. R. 250, 267. As was said by one of the judges in that case: 'The general principle does not seem to apply to the case. What, in truth, is it that we ask the witness? Not to tell us what the written law states, but, generally, what the law is. The question is not as to the language of the written law; for when that language is before us we have no means by which we are to construe it. How many errors might result if a foreign court attempted to collect the law from the language of some of our statutes, which declare instruments in particular cases to be null and void to all intents and purposes, while an English lawyer would state that they are good against the grantor, and that the courts have so expounded the statutes! It is no answer to say that other evidence by word of mouth may be added for the purpose of giving the interpretation of the written law. I am merely showing that our courts require, not the actual, written words of a foreign law, but the law itself, for which purpose a professional witness is required to expound it.'"

But whether we accept the conclusion of these legal experts or not, it seems clear to us that, by the express terms of the Negotiable Instrument Law of New York, the maker of a negotiable instrument, such as we are considering, engages that he will pay it according to its tenor; that is to say, the principal sum, "with all cost of collection, including 10 per cent. fee if collected by attorney." Though this particular provision of the statute does not seem to have been construed by the New York courts, the principle has been settled in favor of its validity in analogous cases.

Thus, in the leading case of Curtis *v.* Van Bergh, 161 N. Y. 47, 55 N. E. 398, the court laid down the principle that a provision for the payment of $50 a day as liquidated damages in case of

failure to complete a building according to contract, where the rental was only $5.75 a day, was not an agreement for a penalty, and was valid. To the same effect is the decision of this court in Crawford *v.* Heatwole, 110 Va. 358, 66 S. E. 46, 34 L. R. A. (N. S.) 587.

[3] Two Virginia cases are cited to support the contention that the stipulation in question is a penalty and contrary to the policy of this state, and therefore not enforceable, viz., Rixey *v.* Pearre Bros. & Co., 89 Va. 113, 15 S. E. 498, and Fields *v.* Fields, 105 Va. 714, 54 S. E. 888.

It is specially noteworthy that the agreements in both these cases antedated the enactment of the Negotiable Instrument Law in March, 1898. The former case followed, without discussion, a Michigan decision, Bullock *v.* Taylor, 39 Mich. 137, 33 Am. Rep. 356, and in the latter it is said: "This court has held that an agreement in a note to pay attorney's fees for collection is a penalty, and not enforceable"—citing the first-named case.

In Stratton *v.* Mutual Assurance Society, 6 Rand. (27 Va.) 28, the court upheld the by-law of a society, which declared that members who, by failing to pay, rendered it necessary to coerce payment of premiums by legal proceedings should indemnify the society for expenses incurred in the employment of collectors by payment of 7½ per cent. on such premium and interest. It was said that the exaction was neither usury nor a penalty, citing Greenhow *v.* Buck, 5 Munf. (19 Va.) 263.

In Campbell *v.* Shields, 6 Leigh (33 Va.) 517, a stipulation in a promissory note to pay, in addition to the principal sum, $48 to cover cost of collection on default of payment, if made in good faith and not as a device to evade the statute of usury, was in point of law not usurious; nor was it a penalty against which equity would relieve.

The same doctrine is announced in Myers *v.* Williams, 85 Va. 621, 8 S. E. 483.

These authorities answer the suggestion that the "attorney's fee clause" is contrary to the public policy of this state. The contrary view is also accentuated by the circumstance that the General Assembly has adopted the Negotiable Instrument Law in force in New York and, generally, throughout the United States. Va. Code 1904, c. 133a.

In a note to that chapter we are told: "This chapter was drawn under the supervision of the State Board of Commissioners for Promoting Uniformity of Legislation in the United States, composed of representatives appointed under legislative authority of the various states."

[4] We shall content ourselves, in conclusion, by calling attention to some of the cases in which this court has maintained

the principle that a contract valid at the place of performance should be enforced in Virginia, though a similar contract made and to be performed within the state would not be upheld. National Mutual Building & Loan Ass'n *v.* Ashworth, 91 Va. 706, 22 S. E. 521; Nickels *v.* People's Bldg., L. & S. Ass'n, 93 Va. 380, 25 S. E. 8; Union Central Life Ins. Co. *v.* Pollard, 94 Va. 146, 152, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715; Middle States Loan Co. *v.* Miller, 104 Va. 464, 467, 51 S. E. 846.

In Nickels *v.* People's Bldg., L. & S. Ass'n, 93 Va. 388, 25 S. E. 11, supra, Keith, P., observes: "While we are therefore of opinion that this contract is unwise and improvident, that its operation is harsh and oppressive, yet, so long as foreign corporations are authorized by the states which create them to make such contracts, and are permitted by this state to do business within its borders, the courts have no choice but to enforce them."

We find no error in the judgment complained of, and it must be affirmed.

Affirmed.

KEITH, P., and CARDWELL, J., absent.

KABLER *v.* SPENCER'S ADM'R *et al.*

March 13, 1913.

[77 S. E. 504.]

1. Lost Instruments (§ 20*)—Bonds—Equity Jurisdiction.—A court of equity has jurisdiction to enforce payment of a lost bond, notwithstanding jurisdiction over lost bonds is also conferred on courts of law by Code, § 3377a.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. §§ 27-30; Dec. Dig. § 20.*]

2. Equity (§ 44*)—Jurisdiction—Attachment—Concurring Jurisdiction of Courts of Law.—A court of equity having once acquired jurisdiction does not lose it because jurisdiction of the same matter is given to courts at law, unless the statute conferring such jurisdiction uses prohibitory or restrictive words.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 141-145; Dec. Dig. § 44.*]

3. Courts (§ 121*)—Amount in Controversy—Bond—Penalty.—Under Code, § 3494, providing that, where an action is on a penal bond with condition for the payment of money, jurisdiction shall be determined as if the undertaking to pay such money had been without

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.